

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

VICTOR EHLER,)
)
 Plaintiff)
)
 v.) Civil No. 95-0148-B
)
 STATE OF MAINE,)
)
 Defendant)

RECOMMENDED DECISION

Petitioner alleges one ground of ineffective assistance of counsel on which he basis this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Read liberally, he alleges that his attorney coerced him into rejecting a plea agreement including a 15 year sentence in favor of trial, which ultimately resulted in his conviction and a sentence of 35 years incarceration.

This ground was raised by Petitioner in a state post-conviction review proceeding. Hearing in that matter was concluded in February, 1995, and a written decision denying post-conviction relief was issued on April 5, 1995. The post-conviction justice found the following relevant factual findings:

Prior to trial the State offered a “plea agreement” to the defendant, . . . calling for both sides to recommend an “agreed” sentence of 15 years commitment to the Department of Corrections in exchange for a plea of guilty entered to all counts.

The State’s offer was fully communicated to the Petitioner along with defense counsel’s opinion that defendant’s best interest would be served by proceeding to trial. Counsel, however, explained that the ultimate decision to accept or reject the plea offer had to be made by Mr. Ehler. The case ultimately proceeded to trial and the defendant was acquitted of one count of attempted murder and convicted of the remaining counts of the indictment which included another count of Class A, Attempted Murder.

Order at 1 (Apr. 5, 1995). The Court has reviewed the record and concludes that it fairly supports these findings. 28 U.S.C. § 2254(d)(8). There is no suggestion that the factual findings are suspect

for any of the other reasons enumerated in section 2254(d). Accordingly, the findings are presumed to be correct and may only be overcome by convincing evidence to the contrary. 28 U.S.C. § 2254(d).

The Petition for Writ of Habeas Corpus alleges only that Petitioner's counsel wrote him a letter "telling [him] not to accept the DA's offer of 15 years, after [he] told him [he] wanted to take the offer." That letter formed part of the record on the state post-conviction review. It reads as follows:

Dear Victor:

During our recent meeting we discussed the advisability of taking the state's offer of fifteen years. After thinking about this at great length, and reviewing the factual situation with several of my colleagues, I think it is in your best interest to reject the state's offer and go to trial. As I indicated at our meeting, *there is no sure fire way to make this call, there is no clear cut answer.* However, my instincts tell me that it would be in your best interests to go to trial. *Ultimately, the decision is yours and yours alone,* I can only offer you my best advice. However, on the presumption that you will agree with me, I continue to prepare for a full blown hearing.

Very truly yours,

/s/ Norman P. Toffolon
Norman P. Toffolon

In light of this uncontroverted evidence, the Court concludes that Petitioner is unable to overcome, with convincing evidence, the presumption of correctness of the state court findings. On the basis of these findings, the Court finds that Petitioner has not shown ineffective assistance of counsel with respect to counsel's advice regarding the state's plea agreement. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

After eliminating the admittedly distorting effect of 20 additional years incarceration, the Court can only conclude that counsel did exactly as counsel was supposed to do. It is, in the first place, counsel’s job to render advice. Counsel’s letter to Petitioner appropriately explained that it was ultimately Petitioner’s decision whether to plead guilty. Petitioner is not entitled to relief on this Petition for Writ of Habeas Corpus.

Conclusion

Accordingly, I hereby recommend the Petition be DISMISS and the Writ of Habeas Corpus DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on June 10, 1996.